Supreme Court, U.S.
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No. 00-1167

IN THE

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly determined that the Tahoe Regional Planning Agency's temporary restriction on development does not constitute a categorical taking of property where the restriction did not deprive petitioners' property of either all use or all value and where the restriction was a reasonable, necessary, and short-term development moratorium while the Agency complied with its obligation to adopt a regional plan for the protection of Lake Tahoe.

2. Absent any showing of clear error, whether the court of appeals properly refused to overturn the district court's finding of fact that the Tahoe Regional Planning Agency's 1984 Regional Plan was not the cause of any harm to petitioners?

3. Whether the court of appeals properly determined that the Tahoe Regional Planning Agency had not waived its statute of limitations defense to petitioners' challenge to the Agency's 1987 Regional Plan?

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Respondents Tahoe Regional Planning Agency ("TRPA" or "the Agency"),[1] the State of California, and the State of Nevada respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

The petition does not present the case that was tried before the district court or heard by the court of appeals. Petitioners rely heavily on unsupported factual assertions regarding the individual petitioners in this action and TRPA's so-called "20 year rolling moratorium" on development in the Tahoe Basin. No such facts were ever introduced at trial. Indeed, the parties specifically stipulated, and the district court ordered, that evidence regarding individual petitioners would not be presented at trial. The district court enforced this stipulation against both petitioners and TRPA. Likewise, because petitioners' challenge to TRPA's 1987 Regional Plan (or "1987 Plan") was filed well after the statute of limitations had run, the district court barred both petitioners and TRPA from introducing any evidence concerning events that occurred after 1987. In presenting a case based largely on unsupported factual allegations, the petition seriously mischaracterizes both the record below and the court of appeals' ruling. The petition accordingly seeks review of questions that are not presented either by the factual record or the lower courts' rulings in this case.

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1. Petitioners' List of Parties incorrectly identifies the members of TRPA's governing body. The correct members are: Dean A. Heller, Dave Solaro, Hal Cole, Drake DeLanoy, Jim Galloway, Leslie Medina, Don Miner, Joanne K. Neft, Wayne Perock, Jon Plank, Brian Sandoval, Larry Sevison, Jerome Waldie, and Peter Chase Neumann.

BACKGROUND

A. Regulatory History.

In 1969, Congress approved the first Tahoe Regional Planning Compact, which created TRPA to address the unique planning and regulatory challenges facing the Tahoe region. Pub. L. No. 91-148, 83 Stat. 360. In particular, Lake Tahoe, an exceptionally pure and clear alpine lake in the northern Sierra Nevada Mountains and one of the most unique natural resources in the nation, is threatened by erosion and sediment caused by development. Petition Appendix ("Pet. App.") at 59-62.

Pursuant to the 1969 Compact, TRPA classified lands in the Lake Tahoe Basin according to their physical characteristics and soil type. Under this system, TRPA designated those lands which pose the highest risk of erosion and sediment runoff into the Lake as "High Hazard" lands. Pet. App. at 66-67. Wetlands and other areas near streams that are characterized by periodic flooding, high water tables, poor natural drainage, and riparian vegetation, were specifically designated as stream environment zone ("SEZ") lands. *Id.* at 64, 67. These land capability classifications and associated limits on development were incorporated into Land Use Ordinance No. 4, adopted by the Agency in 1972. *Id.* at 66.

Despite efforts to control pollution of the Lake under the 1969 Compact, numerous regulatory exceptions allowed excessive development on High Hazard and SEZ lands, with a corresponding deterioration of the Lake's water quality. *Id.* at 67. In an effort to slow this trend, the states and Congress amended the Compact in 1980. *Id.* at 68; *see* Pub. L. No. 96-551, 94 Stat. 3233; Cal. Gov't Code § 66801; N.R.S. § 277.200. The 1980 Compact required TRPA to develop a regulatory program that was to be completed in two phases. First, within 18 months, TRPA was required to establish "environmental threshold carrying capacities" for the region. Pet. App. at 68. Within one year of establishing the environmental thresholds, TRPA was required to adopt a regional plan that would implement and achieve the thresholds. *Id.* at 68. The development of environmental thresholds and a plan that would achieve those thresholds required resolution of exceedingly complex scientific and planning issues, and presented a regulatory challenge that was unprecedented at that time. *Id.* at 74; *California ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1311 (9th Cir. 1985).

Pending completion of its responsibilities under the 1980 Compact, TRPA enacted Ordinance 81-5 which, with exceptions for the construction of some single family homes, temporarily restricted development on High Hazard and SEZ lands. Pet. App. at 7, 70-74. Ordinance 81-5 expired "upon the adoption by the agency of Amendments to the Regional Plan." *Id.* at 7. The Agency adopted the environmental threshold carrying capacities on August 26, 1982. However, it became clear that the complexity of the planning process would prevent the Agency from meeting the Compact's one-year deadline for completion of the regional plan following adoption of the thresholds. Thus, on August 26, 1983, TRPA adopted Resolution 83-21, which temporarily suspended review of development applications "pending adoption of the new regional plan." *Id.* at 8, 74-75.

Eight months later, on April 26, 1984, TRPA adopted its new regional plan. On the following day, however, the

United States District Court for the Eastern District of California issued a temporary restraining order, later followed by a preliminary injunction, prohibiting TRPA from taking any action to approve building projects. *Id.* at 8-9, 76-77. The court of appeals upheld the preliminary injunction in *California v. TRPA*, 766 F.2d. 1308.

B. Actions Challenged by Petitioners.

Petitioners raise a facial takings challenge to four temporally and substantively distinct regulatory measures adopted by TRPA pursuant to its legal obligations under the 1980 Compact. The parties and the courts have consistently separated these challenges into four separate time periods:

Period I (August 24, 1981 - August 26, 1983) covers the effective duration of TRPA Ordinance 81-5, which placed temporary restrictions on development of High Hazard and SEZ lands pending TRPA's adoption of environmental threshold carrying capacities and the regional plan required by the Tahoe Regional Planning Compact of 1980.

Period II (August 27, 1983 - April 25, 1984) covers the effective duration of Resolution 83-21, which temporarily suspended review and approval of projects until TRPA adopted its new regional plan on April 25, 1984.

Period III (April 26, 1984 - July 1, 1987) covers the time period during which the United States District Court for the Eastern District of California enjoined implementation of the 1984 Regional Plan (or "1984 Plan") that TRPA adopted pursuant to the 1980 Compact.

Period IV covers the time period after TRPA adopted an entirely new regional plan on July 2, 1987.

The petition confuses the significant differences between these four separate regulatory measures by mischaracterizing them as a "series of rolling moratoria/ prohibitions" that constitute a continual prohibition on the use of petitioners' properties. Petition for Certiorari ("Pet.") at 6. Because of both the difference in timing and the significant substantive differences in the four regulatory measures, the lower courts and the parties throughout this litigation have carefully distinguished the four relevant time periods. Pet. App. at 9-10, 78; *see also* Plaintiffs' Trial Brief at 2-3 (addressing each time period separately).

Specifically, the district court's findings confirm that Ordinance 81-5 (Period I) and Resolution 83-21 (Period II) imposed reasonable, temporary restrictions on development pending adoption of the 1984 Regional Plan. Pet. App. at 70-75. Petitioners did not challenge these factual determinations in the court of appeals. The district court findings further underscore the substantive differences between the restrictions on development imposed by each of the Period I and Period II restrictions and those imposed during Periods III and IV. For instance, had development not been enjoined by the district court, the 1984 Plan would have permitted development on some High Hazard and SEZs lands. The restrictions imposed by the 1987 Regional Plan are based on entirely new criteria for assessing an individual parcel's suitability for development. *Id.* at 70-78, 106; *see Suitum v. Tahoe Reg'l. Planning Agency*, 520 U.S. 725, 729-730 (1997).

C. The Rulings Below.

The district court rejected petitioners' takings claim in part and upheld it in part. Pet. App. at 57-127. The court rejected petitioners' claim with regard to Period III (the 1984

Regional Plan), because the 1984 Plan had been enjoined by the United States District Court for the Eastern District of California. "The reason a permit could not be obtained was the T.R.O. and the Preliminary Injunction, not the 1984 Plan." *Id.* at 106. The district court also rejected, in an earlier order, petitioners' takings claim with regard to Period IV (the 1987 Regional Plan), on the ground that the claim was barred by the applicable statute of limitations. *Id.* at 128-155.

The district court further found that petitioners "did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit" and had failed to introduce any "evidence . . . regarding the specific diminution in value of any of [their] individual properties." *Id.* at 89, 90. Instead, the court found that "none of the land is completely 'valueless'. . . ." *Id.* at 94. Based on these findings the court determined that application of the factors set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), "clearly leads to the conclusion that there was no taking." Pet. App. at 88. Notwithstanding this determination, the trial court concluded that the temporary moratorium in effect during Period I (Ordinance 81-5) and Period II (Resolution 83-21) had effected a categorical taking under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). Pet. App. at 96-101.

The court of appeals reversed in part and affirmed in part. *Id.* at 1-56. The unanimous panel reversed the district court's rulings that TRPA had taken petitioners' property during Periods I and II. It upheld the trial court's finding that TRPA had not caused a taking during Period III. The court of appeals also agreed with the district court that

the "law of the case" did not preclude TRPA from raising a statute of limitations defense to petitioners' challenge to the 1987 Plan (Period IV), which was filed four years after the Plan was adopted. *Id.* at 47-56.[2] The court of appeals subsequently denied petitioners' request for a rehearing *en banc*. *Id.* at 156.

REASONS FOR DENYING THE WRIT

None of the sweeping questions of law set forth by the petition is, in fact, presented by the record and rulings of the lower courts in this case. The court of appeals did *not* rule "that a temporary moratorium can *never* require constitutional compensation." Pet. at i (emphasis in original). The court did *not* rule that a land use regulatory agency can "escape its constitutional duty to pay for land . . . by the expedient of enacting a series of rolling, back-to-back 'temporary' moratoria/prohibitions extending over a period of 20 years." *Id.* Nor did the court of appeals hold that TRPA can "compel[] a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation." *Id.* (emphasis in original).

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2. The court of appeals did not address several of TRPA's defenses which provide an alternative basis upon which to uphold the ruling in favor of TRPA: TRPA's actions could not have resulted in a taking under the nuisance exception to the takings doctrine; petitioners' claims are barred by the 60 day statute of limitations under the 1980 Compact; and petitioners could not demonstrate that TRPA took their properties because the agency permitted challenges to land capability designations which could have exempted petitioners' properties from the scope of TRPA's regulations.

The court of appeals instead expressly acknowledged that some temporary moratoria may rise to the level of a regulatory taking requiring just compensation, and simply held that petitioners' facial challenge fell short of that standard. The factual findings of the district court, upheld by the court of appeals, also wholly contradict petitioners' overbroad characterizations of TRPA's regulatory measures. Indeed, no facts concerning TRPA's actions after 1987 are in the record because the district court ruled that petitioners' Period IV (1987-present) takings claim is barred by the applicable statute of limitations.

This case, accordingly, presents only the three narrow issues described at the outset of this brief. *See* page i, *supra*. Because moreover, the court of appeals correctly decided each of these issues and none of those rulings conflicts with any decision of this Court or of any other court of appeals, no further review is warranted.

A. The Petition Does Not Present Any Important Legal Issue Meriting Supreme Court Review of the Court of Appeals' Determination That TRPA's Two Year, Eight Month Moratorium Did Not Result in a Categorical Taking Under *Lucas*.

Contrary to the first question presented by the petition (Pet. at i), the court of appeals did *not* hold that a temporary development moratorium "can never" result in an unconstitutional taking of property. The appellate court not only expressly denied any such intent,[3] but repeatedly

3. Indeed, the court of appeals specifically found that an unreasonably long moratorium could result in a taking. *See* Pet. App. at 38.

stressed the exceedingly circumscribed scope of its ruling "[i]n view of the limited nature of the plaintiffs' arguments on appeal." Pet. App. at 19. The court noted at the outset that petitioners "do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*" and that "[o]ur focus is also narrowed by the fact that the [petitioners] bring only a facial challenge to Ordinance 81-5 and Resolution 83-21." Pet. App. at 19.

The only issue before the appellate court, therefore, was the narrow question whether the two year, eight month moratorium on development resulting from two temporary TRPA land use regulations amounted to "one of the 'relatively rare situations' where 'regulation denies all economically beneficial or productive use of land.' " *Id.*, quoting *Lucas*, 505 U.S. at 1016, 1018. Addressing that issue, the court reviewed the evidence and concluded that "the temporary moratorium imposed by these regulations did not deprive the [petitioners'] land in the Lake Tahoe Basin of either all of its 'value' or all of its 'use.' " *Id.* at 36.[4]

4. The district court's factual findings, not disturbed by the court of appeals (Pet. App. 40 n.30), underscore petitioners' failure to meet their burden. The district court found that because property owners in the Tahoe Basin held their property for an average of 25 years prior to development, petitioners "did not have reasonable investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit." Pet. App. at 89. The district court further found that petitioners had made a "calculated choice" not to introduce any evidence "regarding the specific diminution in value of any of the [petitioners'] individual properties." *Id.* at 90. Petitioners did not appeal either of these factual findings by the district court.

1. There is No Conflict in The Law Regarding The Court of Appeals' Determination.

The court of appeals' ruling is consistent with every court decision that has addressed the constitutionality of reasonable development moratoria, and it does not conflict with either *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), or *Lucas*, 505 U.S. 1003. No court has ever determined that a temporary moratorium on development will *always* result in a taking. Instead, every court, like the court of appeals in this case, has consistently adopted a middle ground when evaluating temporary development moratoria.

In *Agins v. Town of Tiburon*, 447 U.S. 255 (1980), this Court applied well-established precedent to determine that,

> [m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

Agins, 447 U.S. at 263 n.9 (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)).

The *Agins* plaintiffs argued that their alleged inability to use or sell their property during the pendency of the city's unsuccessful condemnation proceedings constituted a regulatory taking. 447 U.S. at 263 n.9. In rejecting this argument, this Court relied on the fact that the restriction on

the property's use caused by the city's "good faith planning activities" was temporary in nature:

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended.

Id. Similarly, where, as the district court determined, TRPA acted reasonably in adopting a moratorium, fluctuations in the value of petitioners' properties during the pendency of this moratorium do not provide the basis for finding a taking.

Nothing this Court said seven years later in *First English* alters the holding in *Agins*. *First English* was concerned not with what constitutes a taking, but with the "remedial question" of whether, *once a taking is established*, compensation can be avoided by the government's "[i]nvalidation of the ordinance . . . [and] converting the taking into a 'temporary' one." *First English*, 482 U.S. at 311, 319. Leaving no question as to the scope of its holding, this Court stated "[w]e merely hold that where the government's activities *have already worked a taking of all use of property*, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English*, 482 U.S. at 321 (emphasis added).[5] The Court, accordingly,

5. On remand the California court of appeal determined that the regulation at issue had not effected a taking of plaintiffs' property because the regulation was a temporary moratorium that was reasonable in its purpose, scope, and duration. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. (Cont'd)

expressly stated that it had "no occasion to decide whether the ordinance at issue actually denied appellant all use of its property." *Id.* at 313.

None of the cases that petitioners cite in support of their claim that the court of appeals' decision creates a conflict in the case law holds that a reasonable, temporary moratorium on development constitutes a taking of property. A review of the decision in *Tabb Lakes Ltd. v. United States*, 10 F.3d 796, 800 (Fed. Cir. 1993), for example, demonstrates how far petitioners must stretch to create an issue for this Court to review. Petitioners seize on the statement in *Tabb Lakes*, that "a taking, even for a day, without compensation is prohibited by the Constitution." *Id.* at 800. Petitioners, however, omit the court's next sentence: "However, the question here is, 'Was there a taking?' " Finding that " 'depreciation in value of the property by reason of preliminary activity is not chargeable to the government,' " the Federal Circuit determined that the Army Corps of Engineers had not caused a taking for the three year and two month period during which the Corps prevented plaintiffs from developing their property due to the Corps' improper assertion of regulatory jurisdiction. *Id.* at 801,

(Cont'd)

Rptr. 893, 906 (Cal. Ct. App. 1989). This Court declined to review the decision of the California court. 493 U.S. 1056 (1990). The relatively few other cases to address temporary planning moratoria since this Court's decision in *First English* are in accord. *See Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1202-05 (N.D. Cal. 1988); *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478, 483 (D.N.M. 1995); *Williams v. City of Central*, 907 P.2d 701, 705 (Colo. Ct. App. 1995); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 263 (Minn. Ct. App. 1992); *Tocco v. New Jersey Council on Affordable Housing*, 576 A.2d 328, 330 (N.J. Super. Ct. App. Div. 1990), *cert. denied* 499 U.S. 937 (1991).

citing *First English*, 482 U.S. at 320.[6] The other cases cited in the petition do not involve development moratoria at all and merely reiterate the holding of *First English*: once a taking has been established, the regulating agency must pay compensation for the time period during which the taking was in effect.[7]

2. The Court of Appeals' Ruling is Correct.

The court of appeals' decision falls well within the scope of the relevant case law. The extensive facts proved at trial established the reasonableness of TRPA's two year, eight month moratorium under the circumstances of this case. Pet. App. at 59-82. The trial court described the extent of the serious threat presented to Lake Tahoe and concluded

6. Like the petition, the dissent to the court of appeals' denial of rehearing *en banc* relies on this same statement in *Tabb Lakes* and, as a result, mischaracterizes both that case, the effect of the court of appeals' decision here, and this Court's decision in *First English*. *See* Pet. App. at 162.

7. *Cumberland Farms v. Town of Groton*, 719 A.2d 465, 474-75 (Conn. 1998) (acknowledging that preliminary regulatory activities do not constitute a taking, but once a taking is found compensation must be paid); *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730, 742 (Wis. 1999) (once a taking found, compensation is due); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401, 408 (Neb. 1994) (reiterating the test for a taking of property); *Sintra v. City of Seattle*, 829 P.2d 765, 774 (Wash. 1992) (remanding for determination whether taking occurred and finding that compensation required if temporary taking found); *The 614 Company v. Minneapolis Community Development Agency*, 547 N.W.2d 400, 409 (Minn. 1996) (finding that appellants stated cause of action for a taking, but indicating "ample doubts about appellants' ability to prove its cause of action.").

that TRPA's decision to impose the moratorium was "a direct and reasonable way to combat the problem. Faced with the responsibility for solving a serious problem, TRPA took the necessary steps to do so." *Id.* at 91. The trial court expressly rejected the notion that TRPA was unreasonable in enacting a temporary moratorium on building in High Hazard and SEZ lands, or that TRPA wasted time in the planning process and "should have reached agreement on a regional plan sooner than it did." *Id.* at 115. Based on these clear findings, there is nothing remarkable about the appellate court's conclusion that the temporary moratorium did not constitute a *Lucas* categorical taking.

B. The Court of Appeals Properly Upheld the District Court's Factual Finding, Following Trial, That TRPA's 1984 Regional Plan Was Not the Cause of Petitioners' Harm.

Petitioners also seek review of the court of appeals' decision upholding the district court's finding that TRPA's 1984 Plan was not the cause of petitioners' alleged injuries during Period III. In doing so, they do not explain why the district court's fact-bound finding on causation — which, as noted in the court of appeals' opinion, is reviewed under the "clearly erroneous" standard, and which is an issue that almost never arises in the regulatory takings context — is sufficiently important for review by this Court. Further, petitioners do not point to any conflict between the court of appeals' fact-bound decision and the decisions of other United States courts of appeals or state courts of last resort. In short, no reason whatsoever is presented as to why this Court should review a district court finding of fact.

The district court concluded, after hearing substantial testimony, that the 1984 Plan did not cause petitioners' alleged injuries. Contrary to the representations in the petition, neither the district court nor the court of appeals suggested that an "injunction issued in a different case barr[ing] permits to other landowners" is enough to insulate a regulatory authority from regulatory takings liability. *See* Pet. at i. The district court found after trial that the legal effect of the injunction was far broader. Specifically, the district court found that: a court injunction prevented the 1984 Plan from ever taking effect; the injunction "nullified" the Plan's "escape mechanisms" which could have permitted development on petitioners' lots; the Plan was never applied to petitioners; the injunction was not foreseeable (a finding which alone defeats causation under the "settled tort precepts" to which petitioners point — *see* Pet. at 29); and TRPA "vigorously" fought the injunction. *See* Pet. App. at 105-108. The court of appeals appropriately upheld the factual findings of the district court.

This Court has recently explained that causation determinations "involve application of law to fact, which is left to the factfinder, subject to limited review." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996). Petitioners in this case have failed to identify any "very obvious and exceptional showing of error" in the district court's determinations which would warrant review by this Court. *Id.* at 841 (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949)).

C. Having Conceded That Their Challenge to the 1987 Plan Is Barred by the Statute of Limitations, Petitioners Fail to Raise Any Grounds for this Court to Review Their Stale Claim.

The focus of petitioners' second and third questions presented is exceedingly unclear, but together they appear to raise a takings claim against TRPA's 1987 Regional Plan. The district court, however, found that petitioners failed to initiate a judicial challenge to the new plan until years after the statute of limitations had run, and that the challenge was therefore time-barred. Pet. App. at 155. Petitioners did not contest that ruling on appeal, but argued that under the law of the case, the court of appeals had already determined that TRPA had waived its statute of limitations defense. *Id.* at 47-56. The appellate court, however, agreed with the trial judge that an earlier holding of the court of appeals was not controlling because it was based on "clear factual error" and its "legal holding . . . is clearly wrong." *Id.* at 54. Since petitioners' argument on appeal was confined to "law of the case" and petitioners "offer[ed] no argument on the merits of the timeliness of their Period IV claims," the court of appeals correctly affirmed the district court's dismissal of those claims. *Id.* at 56.

Petitioners cannot now circumvent that dispositive ruling by casting for the first time all of TRPA's regulatory actions as one single takings claim stretching up to the present day. *See* Pet. at 26-29. Petitioners' characterization of TRPA's actions is contrary to the approach followed by both the courts and the parties, including petitioners, throughout this litigation. *See* ¶ 4-5, *supra*. It also lacks any possible legal merit. The cases upon which petitioners rely establish merely that a *timely* takings claim may include prior acts that were

part of an ongoing series of unlawful actions that deprived landowners of their property. *See* Pet. at 26-28. They provide no support for petitioners' belated and quite different suggestion that an otherwise *untimely* takings claim can somehow be made part of a timely claim. As found by the lower court, petitioners' regulatory takings challenge to the 1987 Plan was untimely and cannot now be revived.[8]

CONCLUSION

Respondents respectfully request that the petition be denied.

Respectfully submitted,

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8. Respondents respectfully suggest that the petition in this case need not be held pending this Court's resolution of *Palazzolo v. Rhode Island*, No. 99-2047, currently before the Court. This facial regulatory taking case raises none of the as-applied regulatory takings issues before the Court in *Palazzolo*. Neither ripeness nor the economic viability issue raised in that case is closely related to the rulings of the courts below in this case. Finally, *Palazzolo* does not, like this case, concern a *Lucas* challenge to a temporary moratorium on development.

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